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IN THE

Supreme Court of the United States

October Term, 1936

No. 436

In the Matter
of
UNITED CIGAR STORES COMPANY OF AMERICA,
DEBTOR

ABE SCHWARTZ, *et al*
Petitioners

v.

IRVING TRUST COMPANY, as Trustee of United Cigar Stores Company of America, *et al.*

REPLY TO RESPONDENTS' SUGGESTION FOR AMENDMENT OF THE COURT'S OPINION AND PETITION FOR REHEARING

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Of Counsel

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REPLY TO RESPONDENTS' SUGGESTION FOR AMENDMENT OF THE COURT'S OPINION AND PETITION FOR REHEARING

Counsel for the Trustee has been good enough to serve Mr. Bernays, who argued on our behalf, with a copy of the Trustee's "Suggestion for Amendment of the Court's Opinion, and Petition for Rehearing."

It is said therein (p. 5), in criticism of the second sentence of the Court's opinion (Trustee's italics):

> "* * * *it is expressly stipulated* that in four of the cases the lease had *not been rejected* by the Trustee. See Schedule A to the Stipulation, R. 321."

But until the instant proceeding was instituted by the Trustee, it was common ground between us and counsel for

the Trustee in what sense the word "rejected" was used in the Schedule A to which the Trustee refers. The word was used as referring *only to formal written notice of rejection.*

Before the oral argument herein, the meaning of the stipulation at R. 321 was the subject of discussion between counsel for us and for the Trustee. They agreed that, as stated, the meaning of that stipulation was only that in the nine claims *formal written notice of rejection* had or had not been sent by the Trustee as recorded in the stipulation, and that the stipulation did not dispose of the question whether there was a rejection in fact or in law.

The very part of the record to which the Trustee refers was cited, and the above interpretation thereof was set forth, in the last paragraph of our Reply Brief. Before that Reply Brief was filed, printer's proof thereof was submitted to counsel for the Trustee with the request that any objections to the filing thereof or to any statements made therein, be communicated to our counsel before the brief was finally printed. No objection of any kind was made either to the filing of the brief or to any statement made therein.

The whole issue of rejection was abundantly before the Court. It was referred to at the very outset of the main argument of our brief, at page 11, footnote 1. It was referred to twice in the Trustee's brief at footnote 2 at page 5, and at page 11. The attention of the Court was drawn to the issue emphatically; indeed, our Reply Brief discussed nothing else.

In the Trustee's present "Suggestion," there is no statement that the Trustee denies that there were in fact and in law rejections in *all nine* of the petitioners' claims.

The Trustee does not deny that a "rejection" under the Bankruptcy Law as it existed before the passage of Section 77B was ever anything but the Trustee's election, shown by any act or statement that it chose not to affirm a lease. It is not denied that the whole purpose of a formal written rejection was merely a matter of precaution, so that any other act or statement of the Trustee might not be misinterpreted as an election to affirm. In other words, although there were rejections in all nine of the claims herein and the Trustee does not deny it, it does not wish the Court to say so.

We deem it only fair that the facts set forth herein should appear upon the Court's records, and respectfully beg that this suggestion as to the said facts shall be accepted by the Court for its files.

As to the petition for rehearing, the Court is pointed to no oversight of fact or error of law.

The petition for rehearing is directed solely to the interpretation of the riders. Of the twenty-one pages of argument in the Trustee's main brief, nineteen were devoted to the interpretation of the riders, and indeed, that interpretation was the sole substantive matter to which the Trustee's main Brief was addressed.

Respectfully submitted,

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